Supreme Court U.S.
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No. 01-1710

IN THE

Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioner,

v.

JOHN F. BYRNES, ET AL.,

Respondents.

EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioner,

v.

IRMA M. ALICEA, ET AL.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

In its *amicus curiae* brief, the United States acknowledges that this case presents multiple "conflicts among the courts of appeals on matters of fundamental importance to plans and their participants" that "warrant review by this Court at this time." U.S. Br. 7. The United States takes the position that "[t]he Court should grant the petition for a writ of certiorari," but limited to two questions as reframed by the government. *Id.* at 20. Empire agrees with the United States that the questions identified by the government merit review by this Court. Empire respectfully submits, however, that the phrasing of the questions presented in the petition more fully and accurately reflects the specific conflicts of authority at issue, and a grant of certiorari to review these questions would protect this Court's ability to consider and resolve all aspects of the important issues implicated by the decision below. Moreover, the government's contentions that three of the subsidiary issues addressed in the petition are not presented in this case or are not the subject of a circuit split are based on a strained and untenable reading of the decision below and the relevant case law. The questions set forth in the petition, including subsidiary issues, are plainly presented here and involve mature splits of authority among the circuit courts. The petition should be granted in its entirety in order to provide the Court with an unfettered opportunity to consider the important questions raised by this case.

I. The First Question Presented, Encompassing Two Subsidiary Circuit Splits Concerning Vesting Of Welfare Plan Benefits, Merits Plenary Review

1. The first subsidiary issue encompassed within the first question presented in the petition is whether "clear and express language" is required to create vested ERISA welfare plan benefits. The United States agrees that this issue has divided the circuits and warrants this Court's review. U.S.

Br. 8-9. The government, however, has proposed an alternate phrasing of this question that focuses on the admissibility of extrinsic evidence to aid in interpreting ambiguous plan language. *Id.* at 1 (sic) (question 1). The evidentiary issue identified in the government's alternative question presented is clearly subsumed within the first question presented by Empire, but the question as worded in the petition more appropriately encompasses the entirety of the substantive test for vesting of benefits, rather than focusing primarily on an evidentiary rule. The overarching question for this Court to decide, and the specific issue that has divided the courts of appeals, is whether ambiguous plan language can give rise to *vested* benefits. The government, by contrast, has chosen to focus on the anterior and corollary evidentiary consequences that would follow a ruling on the core issue. The question as framed by Empire warrants this Court's review.[1]

[1] On the merits, Empire's position on this issue is supported by a majority of the circuits that have considered the issue. The minority approach followed below and advocated by the government ignores, among other things, the decision by Congress to treat vesting of *pension* and *welfare* benefits very differently under ERISA. Unlike pension plans, in which either the benefit or contribution is defined, thereby enabling an employer to predict costs and to plan for such benefits in the future, the costs of welfare benefits fluctuate widely and are inherently unpredictable. A rule that results in undue vesting of welfare plan benefits is contrary to the desire by Congress "to keep [] costs within reasonable limits [and to avoid] placing . . . a burden on employers [that] would inhibit the establishment of such plans." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990) (internal quotation marks and citations omitted). The minority approach also ignores the common-law tradition of at-will employment and the resulting expectation that welfare benefits are subject to change at the will of the employer, which the enactment of ERISA in no way altered. More importantly, by shifting the inquiry away from plan documents to a limitless array of miscellaneous "extrinsic evidence," the minority approach greatly complicates the task of plan administration. "As a matter of statutory policy, ERISA places great weight on the written terms of the formal plan documents," because of the need for "predictability as to an employer's future obligations." *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994).

2. The second subsidiary issue encompassed within the first question presented is whether, even assuming plan language sufficient to give rise to vested welfare benefits upon retirement, retiree welfare benefits vest *before* or *upon* retirement. At stake is whether an employer has the right to amend a welfare plan by expressly reserving the right to modify or to eliminate future retirement welfare benefits. Although the United States takes the position that there is no split of authority on this issue,[2] the government mischaracterizes the ruling below and the contrary holdings of three other circuits.

The United States attempts to minimize the importance of this issue by contending that "[n]o court of appeals has adopted a rule that retiree welfare benefits *cannot* vest before retirement." U.S. Br. 10 (emphasis added). That argument, however, merely sidesteps the split of authority by ignoring the issue actually presented. To be sure, no court has taken the position that employers *cannot under any circumstances* provide retirement welfare benefits that vest before retirement—such as through a clear statement in plan documents granting vested retirement benefits and stating that for current employees the employer will not alter the retirement benefits package at any time before or after those employees retire—but that type of plan language is absent here and has nothing to do with the issue presented.

Instead, the court below expressly held that the *same* ambiguous plan language that purportedly entitled respondents to a trial concerning whether welfare benefits vested upon retirement could *also* prevent Empire from modifying the plan with respect to then-current employees *who had not yet retired*. Pet. App. 12a-15a. The court based this holding

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[2] The United States concedes that this subsidiary issue is included within the scope of the "question of the standard for evaluating contractual vesting claims, on which there is a firm and acknowledged circuit conflict." U.S. Br. 10.

on the doctrine of unilateral contract and the concept that respondents "accepted" the supposed offer of retirement benefits by working for Empire. *Id.* at 13a. The result was a rule that where a plan confers benefits that vest upon retirement, current employees may automatically obtain the vested and irrevocable right to retire with those same benefits at any point in the future.

That position has been rejected by three other circuits. *See Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000) (affirming summary judgment for employer where employees retired after plan amendment reducing retiree insurance benefits); *Houghton v. SIPCO, Inc.*, 38 F.3d 953, 957-58 (8th Cir. 1994) (reversing judgment in favor of employees under similar circumstances); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 936-37 (5th Cir. 1993) (affirming summary judgment for employer under similar circumstances). Thus, the question whether retirement welfare benefits vest before retirement in the absence of plan language specifically addressing pre-retirement vesting is important, squarely presented on this record, and the subject of a clear disagreement among the courts of appeals.

II. The Second Question Presented, Encompassing Three Subsidiary Circuit Splits Concerning ERISA Fiduciary Duties, Merits Plenary Review

1. The first subsidiary issue encompassed within the second question presented in the petition is whether a plaintiff may pursue both a claim for breach of fiduciary duty under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), and a claim for denial of benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), to address the same injury. The United States agrees that "review by this Court is warranted to resolve the circuit conflict on this recurring issue." U.S. Br. 16. The government, however, proposes a different phrasing of the question, focusing on whether "plan participants may combine, in a single action, a claim for benefits . . . and a

claim for breach of fiduciary duty based on the misrepresentation of plan benefits." *Id.* at 1 (sic) (question 2). The government argues for this alternative formulation because, in its view, respondents allege "two distinct injuries" in their benefits and fiduciary duty claims: denial of benefits under the terms of the plan and misrepresentation of the benefits respondents would receive. *Id.* at 14.

The government's attempt to reframe this issue is based on a misreading of the decision and record below. Respondents do not, as the government contends, base their fiduciary duty claim solely on alleged misrepresentations. Instead, the theory advanced by respondents and adopted by the court below is that "Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits. *It therefore follows that* . . . Empire's unilateral reduction in benefits . . . may have violated the plan documents and, in turn, [the fiduciary duties imposed by] ERISA § 404(a)(1)(D)." Pet. App. 20a (emphasis added). Thus, respondents' fiduciary duty claim is inextricably intertwined with their § 502(a)(1)(B) claim for "vested" benefits. The government's contrary characterization of the issue simply ignores the substantial overlap between respondents' claims for benefits and for breach of fiduciary duty and thus does not fully address the factual and legal context presented by this case. This issue, as framed in the petition and encompassed within the second question presented, has divided the circuits and warrants this Court's review. Pet. 20-24.[3]

2. The second subsidiary issue encompassed within the second question presented in the petition is whether an em-

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[3] On the merits, Empire's position on this issue accords with the view of a majority of courts of appeals that have considered the matter. The government's view is inconsistent with this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489, 512, 515 (1996), and with the salutary policy of focusing ERISA litigation, to the extent possible, on claims for benefits. Pet. 20-24.

ployer's amendment of an ERISA welfare plan constitutes a fiduciary act, an issue as to which the holding below conflicts with case law from this Court and three other circuits. Rather than addressing the question raised by Empire, however, the government posits an entirely different straw-man issue that does not accurately describe the decision below, and then purports to demonstrate why *that* issue is not worthy of this Court's review. The government's analysis rests entirely on its assertion that the court of appeals did *not* hold that "the action of an employer in modifying a welfare plan may constitute a 'fiduciary act.'" U.S. Br. 16. The government's assertion is demonstrably incorrect, and its objections to review of this issue therefore fail.

As the court of appeals recognized, respondents' "breach of fiduciary duty claim under ERISA § 404(a)(1)(D) alleges that Empire, in reducing their life insurance coverage to $7500, failed to act in accordance with the life insurance plan documents." Pet. App. 19a. In order for that reduction in benefits to be actionable as a fiduciary breach, respondents had to demonstrate that Empire's conduct in amending the plan to reduce benefits could constitute a fiduciary act. Notwithstanding this Court's repeated recognition that plan amendment is not a fiduciary act (*see* Pet. 25), the court below expressly held that Empire's conduct in amending the plan to reduce benefits *could* constitute a fiduciary act: "[W]e reject both Empire's assertion and the district court's conclusion that Empire was not acting in a fiduciary capacity when it reduced [respondents'] life insurance benefits." Pet. App. 19a. The court reasoned that "Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits," and "[i]t therefore follows that . . . Empire's unilateral reduction in benefits . . . may have violated the plan documents and, in turn," ERISA fiduciary duties. *Id.* at 20a. Thus, according to the court below, the act of plan amendment itself can constitute a fiduciary act, at

least as long as it "may have violated the plan documents." *Id.*

In light of the clear language used by the court below, the government's assertion that "[t]he court . . . made no such holding in this case," U.S. Br. 16, is patently incorrect. By the same token, the government's focus on whether a decision was "discretionary" is entirely inapt. *Id.* at 17. The court of appeals' reference to "discretionary" conduct was merely its attempt to justify its holding that plan amendment (which is certainly within the "discretion" of the employer) can constitute a fiduciary act, since the definition of "fiduciary" requires the exercise of "discretionary authority" with respect to plan management, plan assets, or plan administration. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); *see* Pet. App. 19a-20a. But the court of appeals did *not* hold, as the United States suggests, that there was or may have been some "discretionary" act *other* than plan amendment that triggered fiduciary status; to the contrary, the court below made quite clear that the only "discretionary" act at issue *was* "Empire's decision to reduce benefits"—i.e., its decision *to amend the plan*.[4] Pet. App. 20a. Thus, the government's attempt to distinguish the "discretionary" act from plan amendment is conclusively refuted by the decision below, which unambiguously holds that plan amendment can be a

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[4] Tellingly, the government is wholly unable to explain what mysterious "discretionary" act *other* than plan amendment the court of appeals was supposedly contemplating. Indeed, the government goes so far as to note that "there is no finding or holding that any such 'discretionary' act in the administration (*as distinguished from the amendment*) of the plan occurred in this case." U.S. Br. 17 (emphasis added). That is true, but only because the court of appeals was not engaged in imagining some hypothetical "discretionary" act *distinct* from plan amendment. Rather, the court of appeals made perfectly clear that the "discretionary" act it considered sufficient to support a claim for fiduciary breach was "Empire's decision to reduce benefits," and that decision alone. Pet. App. 20a. The government's claim to the contrary is sheer sophistry.

fiduciary act. As the government tacitly admits, and as the petition persuasively demonstrates (Pet. 25-27), that holding squarely conflicts with precedent of this Court and of the Third, Sixth, and Seventh Circuits.

The government has badly misread the decision below, perhaps in order to avoid the necessity of conceding that the court of appeals' holding on this issue is simply indefensible. There is nothing "hypothetical" or "premature," U.S. Br. 17, about Empire's request for review on this question. The court of appeals held that respondents can pursue their claim for fiduciary breach predicated on conduct—the amendment of an ERISA plan—that *as a matter of law* cannot constitute a fiduciary act and thus *cannot* be actionable as a fiduciary breach. This issue is squarely presented on this record, involves a clear conflict of authority with the decisions of this Court and of several courts of appeals, and merits review by this Court.

3. The third subsidiary issue encompassed within the second question presented in the petition is whether an employer has a duty to disclose the non-vested nature of ERISA welfare plan benefits in every communication to plan participants that refers to those benefits, even when the plan documents expressly set forth the employer's right to amend or to terminate those benefits. The government opts to frame the issue as "[w]hether an employer breaches a fiduciary duty under ERISA by promising lifetime welfare benefits to employees without fairly and clearly disclosing that it reserves the right to change or terminate those benefits." U.S. Br. 1 (sic) (question 4). That statement of the issue, as well as the government's analysis, fails to address the question that Empire has raised, the facts of this case, the actual ruling below, or the clear division of authority among the courts of appeals. The government's position that its own issue, as reformulated, is not worthy of review is irrelevant, because the question actually presented by Empire merits plenary review.

The alleged "misrepresentation" in this case involves Empire's statements in various documents that retirees will receive lifetime welfare plan benefits, without reiterating in each of those documents that the benefits (like welfare benefits generally) are subject to modification or termination. As noted in the petition, Empire clearly disclosed in its 1987 and subsequent summary plan descriptions that the company "reserves its right to end" or "to amend . . . the Plan[] at any time." Pet. 4-5 (quoting Pet. App. 5a-6a). According to the court of appeals, "Empire may have still violated any fiduciary duties in its retiree letters and other communications which promised lifetime benefits *but failed to note that Empire could reduce or terminate these benefits at any time.*" Pet. App. 21a (emphasis added).

Thus, the court of appeals expressly held that Empire's failure to disclose that it "could reduce or terminate these benefits at any time" could give rise to a fiduciary breach when coupled with references to "lifetime" benefits. *Id.* As demonstrated in the petition, that holding squarely conflicts with the decisions of other courts of appeals. In *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998), for example, the employer ("GM") offered its employees "lifetime" health care benefits but also reserved its right in certain plan documents to amend or to terminate its benefits plan. *Id.* at 394. GM told employees "that their coverage was to be paid by GM for their lifetimes," but did *not* tell them "at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." *Id.* at 405. The Sixth Circuit expressly held that "GM's failure to begin every communication to plan participants with a caveat" was not actionable as a fiduciary breach, and that an employer is "not required to disclose in its summary plan descriptions that the plan was subject to amendment or termination." *Id. See also Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950-52 (8th Cir. 1994) (notwithstanding description of lifetime benefits, "a welfare plan SPD is not required

to disclose that plan benefits are not vested"), *aff'g* 867 F. Supp. 1384, 1389-90 (N.D. Iowa 1993) (specifying lifetime benefits).

This issue is squarely presented by the decision below, reflects a clear circuit split, and merits this Court's review.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

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